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Nambawan Super Ltd v Kimas [2013] PGNC 23; N5062 (27 February 2013)

[N5062](#)

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

CIA 25 OF 2010

NAMBAWAN SUPER LIMITED
Plaintiff

V

PEPI S. KIMAS, as delegate of the Minister for Lands and Physical Planning
First Respondent

AND:

HON. SIR PUKA TEMU, MP, Minister for Lands and Physical Planning
Second Respondent

AND:

THE INDEPENDENT STATE OF PAPUA NEW GUINEA
Third Respondent

AND:

RAGA KAVANA, Registrar of Titles
Fourth Respondent

AND:

TEDDY TASION trading as EUROPAC RENTALS
Fifth Respondent

Waigani : Salika, DCJ
2011: 7 April
2013: 27 February

PRACTICE AND PROCEDURE – Land Act of 1996 – s.122 of Land Act – Forfeiture of a State lease - Procedure for forfeiture under s.122 of Land Act not complied with - Appeal under s.145 of Land Act – Nature and form of appeal.

Facts:

This appeal is against the decision of the First, Second, Third and Fourth Respondents dated 14th September 2009 and published in the National Gazette No. G173 on 17th September 2009 forfeiting State Lease described as Volume 19 Folio 62 over the land known as Allotment 5 Section 429, Hohola, NCD, pursuant to s. 142 of the [Land Act 1996](#). Objection to Competency of the appeal was raised and argued but I ruled that the appeal was competent and properly before the Court. The appeal was then argued before me on 19 November, 2010 and I reserved the decision generally. The issue then is whether or not the State Lease held by Eda Mutual was validly forfeited.

Held:

The forfeiture of Eda Mutuals lease was premature, erroneous and not in conformity with the requirements of the process under s. 122(2)(a), (3 and (4) of the [Land Act 1996](#). The forfeiture was therefore unlawful.

Cases Cited

*Commissioner General of the Internal Revenue Commission v Bougainville Copper Ltd (2008) SC 720***Counsel**

Mr G Geroro, for the Appellant

Mr W Mapiso, for the 1, 2nd, 3rd & 4th Defendants

Mr Liria, for the 5th Defendant

27th February, 2013

1 SALIKA, DCJ: Background: This appeal is against the decision of the First, Second, Third and Fourth Respondents dated 14th September 2009 and published in the National Gazette No. G173 on 17th September 2009 forfeiting State Lease described as Volume 19 Folio 62 over the land known as Allotment 5 Section 429, Hohola, NCD, pursuant to s. 142 of the [Land Act 1996](#).

2 Objection to Competency of the appeal was raised and argued but I ruled that the appeal was competent and properly before the Court. The appeal was then argued before me on 19 November, 2010 and I reserved the decision generally.

3 The matter has taken 2 years 3 months which I admit is a long time and I take full responsibility for justice delayed and therefore justice denied. However, as the saying also goes, its better later than never, and so I fully embrace this and take the opportunity to deliver the decision, although late.

Facts

4 On 17 December 1996, HBCL No 3 Pty Ltd was registered as the proprietor of State Lease Volume 19, Folio 62 over (and described as Allotment 5, Section 429 (Hohola) Port Moresby, NCD. The State lease was for a period of 99 years commencing 28 November 1996 to 27 November 2095.

5 On 16 January 1997, the State lease issued to HBCL No 3 Pty Ltd was transferred to Eda Mutual Pty Ltd.

6 On 5 October 1999, the plaintiff was registered as the Mortgagee over the lease.

7 Eda Mutual Pty Ltd over a period of more than 6 months did not pay its annual land rental fees and as a result failed to comply with the improvement covenants and conditions of the lease agreement.

8 On 8 June 2009, Pepi Kimas, First Respondent issued a Notice to Show Cause to Eda Mutual pursuant to s. 122(1) and (2) of the [Land Act 1996](#).

9 In July 2009, The Lands Department through a Jason Komet, the Compliance Officer for Southern Region did a site inspection of the property and compiled a report, citing K132,000.00 in overdue annual land rental arrears and recommended forfeiture.

10 On 31 July 2009, Jason Komet served the Notice to Show Cause on a tenant of the property namely, IVAN EVARA, who accepted service of the Notice. The Notice required a one month response.

11 In August 2009, a reply to the Notice to Show Cause was not forthcoming from Eda Mutual and consequently a forfeiture notice was issued by the First Respondent on 14 September, 2009. On 17 September 2009, the forfeiture was gazetted in National Gazette No G173 for reasons that:

(a) The annual lease rentals remained unpaid and due for a period of more than 6 months;
and

(b) The leasor had failed to comply with a Notice given under s. 122(2)(a) of the [Land Act 1996](#).

12. On 15 October 2009, the 28 day appeal period allowed under the [Land Act](#) lapsed.

13. On 5 November 2009, the plaintiff became aware of the forfeiture notice.

14. On 9 November 2009, the plaintiff requested the First Respondent to revoke the forfeiture notice and forewarned that unless an undertaking was immediately given not to deal with the lease, the plaintiff would apply to injunct the first Respondent to protect its interests.

15. On 23 February 2010, this Notice of Appeal was filed by the plaintiff in the National Court, pursuant to the National Court orders made on 12 February 2010, in proceedings OS (APP) 699 of 2009, whereby the Court granted leave for the plaintiff to lodge an appeal within 14 days, against the decision of the First Respondent dated 14 September 2009, pursuant to s. 142(2) of the [Land Act 1996](#).

16. In the meantime, on 9 June 2009, the Fifth Respondent, through its owner, a Teddy Tasion was looking for land to start up a vehicle rental business. He noticed that Allotment 5, Section 429, Hohola was undeveloped which prompted him to write to the First Respondent, expressing his interest on the Land and to have the land exempted from advertisement.

17. On 22 July 2009 Teddy Tasion applied to the Lands Department and the Minister for Lands to grant a State Lease to him trading as Europa Cars on Allotment 5, Section 429, Hohola.

18. After the forfeiture notice was gazetted in The National Gazette, The Minister for Lands, through his delegate, (the First Respondent), then issued an Exemption Notice, allowing Europa Cars to be the only applicant for the grant of State Lease of the subject property.

19. Europa's application went before the National Land Board and a Business (Commercial) State Lease was granted to it over Allotment 5, Section 429, Hohola. This was gazetted on 12 November, 2009.

Issues

20. This appeal is against the decision of the Second Respondent, through the First Respondent to forfeit the State Lease over Allotment 5, Section 429, (Hohola) held by Eda Mutual (PNG) Pty Ltd. The appellant is the registered Mortgagee of that State Lease held by Eda Mutual.

21. The issue then is whether or not the State Lease held by Eda Mutual was validly forfeited.

22. However, before that issue is determined another issue arises, and that is -
What is the proper approach to deal with this appeal, because s. 142 of the *Act* does not provide for the procedure on how the appeal is to be filed and how it is to be dealt with.

Appeals are creatures of Statute

23. Counsel could not point to the Court any precedent regarding appeals brought under s. 142 of the [Land Act 1996](#), and in my own limited search I could not find any precedent either, on the nature of such an appeal under that provision of the *Act*. Counsel have however usefully cited the Supreme Court decision in *Commissioner General of the Internal Revenue Commission v Bougainville Copper Ltd* (2008) SC 720 (3 July 2008). The facts there are different to the appeal here, but the statement of the law as to the proper approach to determine an appeal is pertinent to the broad issue in this case. In that case the Supreme Court said that the National Court in the exercise of its appellate jurisdiction must look at the nature and purpose of the law that has conferred the appellate jurisdiction. This is because an appeal is a creature of statute. In other words, in this case, this Court must look at and ascertain the legislative intent of s. 142 of the [Land Act 1996](#).

24. In that regard s. 142 of the [Land Act 1996](#) provides:

["PART XXII-APPEALS.](#)

142. Appeal to National Court.

(1) *An interested person may appeal to the national Court on-*

- (a) *re-appraisal of imposition of rent, or a variation or imposition of royalty, under Section 100(5); or*
- (b) *The forfeiture of a lease.*

(2) *An appeal under Subsection (1) shall be made within 28 days after the matter complained of, or within such further time as the National Court for any special reason allows.*

(3) *Where an appeal is made under Subsection (1), the matter complained of has no effect until-*

- (a) *The National Court has decided the appeal; or*
- (b) *Where no further appeal is made to the Supreme Court-the period prescribed for making an appeal has expired; or*
- (c) *Where a further appeal is made to the Supreme Court-the Supreme Court has decided the appeal, and, subject to Subsection (4), a lessee may in the meantime continue lawfully to occupy the land the subject of the appeal and to exercise his rights, and shall fulfill his obligations, under the lease.*

(4) *When an appeal is made under Subsection (1)(a) the decision of the National Court or of the Supreme Court shall be deemed to operate as from the date of the matter complained of."*

25. Before looking into s. 142 of the [Land Act](#), I also find some useful guide from *Commissioner General of Internal Revenue Commission v Bougainville Copper Ltd* (supra), which counsel have referred me to, which says that there are 3 possibilities as to the nature of an appeal, which are:

(a) The appeal is restricted to the material that was considered by the original decision maker [Lands Minister in the present case], which can be called an appeal in the narrow-sense.

(b) The appeal is based on the material that was considered by the Lands Minister, subject to the power of the Court to grant leave to the parties to adduce additional evidence, which can be called an appeal by way of a rehearing.

(c) The appeal involves a fresh hearing, in which all issues of fact and law are re-tried and the parties have the right to adduce whatever evidence they wish to, which can be called a *de novo* appeal.

26. Section 142 is silent on the process and how an appeal is to be instituted and how it should be dealt with. In this case, by this appeal, the appellant is seeking to set aside the forfeiture which has already occurred. It is seeking to set aside an administrative decision of the delegate of the Lands Minister's decision. Ordinarily, such applicants have invoked the judicial review jurisdiction under Order 16 of the *National Court Rules*.

Section 142 however, does the following:

(a) Creates a right of appeal against forfeiture of a lease;

(b) Prescribes the time limited to appeal; and

(c) Temporarily stays the effect of the forfeiture notice until either the determination of the appeal by the National Court, expiration of the prescribed time to appeal to the Supreme Court from the National Court decision or the determination of the appeal by Supreme Court.

28. In my opinion the appellant has decided, in this case to invoke the jurisdiction of this Court under s. 142 of the [Land Act](#). The provisions do not say that an appeal under this Section is to be restricted to only rehearing of material that was before the original decision maker, or based on material before the original decision maker and subject to the powers of the Court to grant leave to parties to adduce additional evidence or a de novo appeal.

29. The scheme under s. 122 of the [Land Act 1996](#), in my opinion does not intend the Court to usurp the powers of the Minister granted under s. 122 of the [Land Act](#).

30. Moreover, there is no provision under the [Land Act 1996](#) for the Lands Minister to supply its record of proceedings or depositions for the purpose of an appeal. However, as the appeal is against a decision of the Minister, it is desirable to have a full record of the Minister's decision before the appellate body, the National Court. However the scheme under Order 18 of the *National Court Rules* could be adopted when considering the basis for availability of transcript of proceedings where the original decision was made, compilation of the Appeal Book, and whether a party should be granted leave to call fresh evidence by the court on application and that is what I intend to do in this case.

31. The focus of the appeal under s. 142 must be on the Minister's decision to forfeit the original lease. The primary question is whether the Minister erred in the forfeiture of the lease by non compliance with the prescribed process. The [Land Act 1996](#) does not allow the Court to go beyond the decision made under s. 122 of the [Land Act 1996](#) and begin conducting a fresh hearing which would be encroaching on the decision making power of the Minister or his delegate conferred on him by the maker of that provision.

32. Having heard submissions from counsel and the three (3) ways suggested in the *Internal Revenue Commission v Bougainville Copper Ltd* (supra) case, I am of the view that an appeal under s. 142(1)(a) and (2) of the [Land Act 1996](#) should be by way of a rehearing based on reconsideration of the material that were before the Minister under Order 18 Rules 4(5)(f) to (2); 5(5)(i), (x) and 10(s) of the *National Court Rules* that is where the Court grants leave to call fresh evidence. This to me, would be the fairest thing to do to achieve justice.

33. Having come to this view, I now go on to deal with the substantive issue and that is whether the Minister or his delegate, as the case may be, erred in the forfeiture of the Lease to Eda Mutual. To answer that question, it is necessary to set out s. 122 of the [Land Act 1996](#).

34. Section 122 of the *Act* provides:

"122. *Forfeiture of State Lease.*

1. *The Minister may, by notice in the National Gazette, forfeit a State Lease-*
 - (a) *If rent on the lease remains due and unpaid for a period of six months; or*
 - (b) *If fees are not paid in accordance with this Act; or*
 - (c) *If the amount payable in respect of improvements is not paid in accordance with this Act;*
or
 - (d) *If –*
 - (i) *A covenant or condition of the lease; or*
 - (ii) *A provision of this Act relating to the lease; or*
 - (iii) *A requirement of a notice under Section 91 relating to the lease;*

Is not complied with; or

(e) If the granting of the lease has been obtained, in the opinion of the Minister; wholly or partly as a result of statements that were, to the knowledge of the lessee, false or misleading.

2. *Before forfeiting a State Lease under Subsection (1), the Minister –*
 - (a) *Shall serve notice on the lessee calling on him to show cause, within a period specified in the notice, why the lease should not be forfeited on the ground or grounds specified in the notice; and*
 - (b) *May, whether or not cause has been shown in accordance with a notice under Paragraph (a), serve on the lessee a notice requiring him, within a period specified in the notice, to comply with the covenants or conditions of the lease of the provisions of this Act.*
3. *The Minister shall not forfeit a lease under this section unless –*
 - (a) *The lessee has failed to comply with a notice under Subsection (2)(a) or (b); or*
 - (b) *The lessee has failed to show good cause why the lease should not be forfeited.*
4. *Copies of a notice of forfeiture and a notice under Subsection (2)(a) or (b) shall be served on all persons who, to the knowledge of the Departmental Head, have or claim to have a right, title, estate or interest in, to or in relation to the land, or such of them as can with reasonable diligence be obtained and found.*
5. *No acceptance of rent by the State waives a right to forfeit a lease under this Act.*
6. *For the purposes of this section the grant of an application for State lease shall be deemed to be the grant of the lease." (Underlining's mine).*

35. The next question then is did the Minister follow the proper process of forfeiture under s. 122 of the [Land Act](#)?

There is no dispute Eda Mutual or the appellant in this case failed to pay rent on the lease for over 6 months. It is also not disputed that they failed to comply with the Covenants and the conditions of the lease. Therefore, the Minister was entitled to issue the Notice under s. 122(2)(a) of the Act.

36. However, that notice is to be served on the lessee who is Eda Mutual (PNG) Pty Ltd. The Notice was served on Ivan Evara, who is said to be a tenant on the property. The Minister is required to serve the Notice on Eda Mutual at its registered address of service. Copies of the Notice are also to be served on all persons who, to the knowledge of the Departmental Head, have a claim or "a rightor interest" in relation to the land. In this case Nambawan Super Limited had an interest in the land as the Mortgagee. Had a due diligent check been done, the registered business address of Eda Mutual and Nambawan Super

Limited's interest in the land would have been discovered. However, as it turned out both Eda Mutual and Nambawan Super were never served the Notice to show cause.

37. As a result the Minister ought not to have forfeited the lease under s. 122(3). Again had due diligence checks been made as to whether the lessee had been properly served, the Minister would have found out that the lessee had not been served at all and therefore he could not forfeit the lease as yet.

38. The net result is that the forfeiture of Eda Mutuals lease was premature, erroneous and not in conformity with the requirements of the process under s. 122(2)(a), (3 and (4) of the [Land Act 1996](#). In other words the forfeiture was unlawful.

Peter Allan Lowing Lawyers: *Lawyer for the Appellant*
Solicitor General: *Lawyer for the First, Second, Third & Fourth Respondents*
Liria Lawyers: *Lawyer for the Fifth Respondent*

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